

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MELVIN PUSEY,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 02-1487-SLR
)	
THOMAS L. CARROLL,)	
Warden, and ATTORNEY)	
GENERAL OF THE STATE)	
OF DELAWARE,)	
)	
Respondents.)	

Darryl K. Fountain, Esquire, Wilmington, Delaware. Counsel for petitioner.

Thomas E. Brown, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Counsel for respondents.

MEMORANDUM OPINION

November 13, 2003
Wilmington, Delaware

Robinson, Chief Judge

I. INTRODUCTION

Petitioner Melvin Pusey is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 1) For the reasons that follow, the court concludes that petitioner's application is time-barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1). Accordingly, the court will dismiss the petition as untimely.

II. FACTUAL AND PROCEDURAL BACKGROUND

In April 1998, petitioner was indicted for multiple counts of aggravated menacing, terroristic threatening, assault, reckless endangering, unlawful imprisonment, and assorted weapons charges. On October 15, 1998, after three days of a jury trial, petitioner pled guilty to third degree assault, aggravated menacing, possession of a firearm by a prohibited person, and two counts of terroristic threatening. In exchange, respondents agreed to dismiss the remaining counts of the indictment and to recommend a cap of twenty years imprisonment. However, the plea agreement noted respondents' intent to move for habitual sentencing under 11 DEL. C. ANN. § 4214(a), which subjected petitioner to a discretionary life sentence. (D.I. 8, State v. Pusey, Crim. A. Nos. 98-04-1123-1137, "Plea Agreement")

On December 18, 1998, prior to sentencing, petitioner's new

counsel moved to withdraw petitioner's guilty plea. Petitioner alleged his plea was involuntary because it was prompted by the trial judge's off-the-record inquiry of petitioner's first counsel as to whether plea discussions had occurred in this matter. (D.I. 8, State v. Pusey, No. 9804014416, "Motion to Withdraw a Guilty Plea," in App. to Appellant's Op. Br. at A-15,16) At sentencing, the Delaware Superior Court denied petitioner's motion to withdraw the plea. (D.I. 8, Transcript of Proceedings on Dec. 18, 1998, State v. Pusey, Crim. A. Nos. 98-04-1123 through 1137 in App. to Appellant's Op. Br. at A-17 through A-36) He was declared an habitual offender under § 4214(a) and sentenced to a total of sixteen years imprisonment, to be followed by six months probation. (D.I. 8, Sentencing Order in State v. Pusey, Crim. A. Nos. 98-04127, 1123, 1130, 1129, 1137)

The Delaware Supreme Court affirmed petitioner's conviction but remanded the matter to the Delaware Superior Court for it to correct the sentencing order. Pusey v. State, No. 20, 1999 (Del. Aug. 4, 1999). On September 24, 1999, the Delaware Superior Court entered an order correcting petitioner's sentence with respect to the habitual offender status for only the misdemeanor offenses. (D.I. 8, State v. Pusey, ID No. 9804014416, Order (Del. Super. Ct. Sept. 15, 1999))

On January 23, 2002, petitioner's third new attorney moved

for state post-conviction relief under Delaware Superior Court Criminal Rule 61. Petitioner's Rule 61 motion re-iterated the allegations raised in his "Motion to Withdraw a Guilty Plea." (D.I. 8, State v. Pusey, Crim. A. Nos. 98-04-1123 through 1137, "Notice of Motion") On August 30, 2002, the Superior Court dismissed this motion as formerly adjudicated and thus, procedurally barred under Rule 61(i)(4). State v. Pusey, ID No. 9804014416, Order (Del. Super. Ct. Aug. 30, 2002). Petitioner did not appeal that decision.

Petitioner's fourth attorney filed the pending application for federal habeas relief on September 24, 2002, alleging: 1) the Delaware Superior Court violated Superior Court Criminal Rule 26.1; and 2) petitioner's guilty plea was involuntary because the plea colloquy lacked a factual foundation. (D.I. 1)

Respondents contend that claim one of petitioner's § 2254 petition only alleges a violation of state law and also that the entire petition is time-barred. Respondents ask the court to dismiss the petition as untimely. (D.I. 8)

Petitioner's habeas petition is now ripe for review.

III. DISCUSSION

A. Claim one fails to allege a violation of federal or constitutional law

Claim one of petitioner's habeas petition asserts that the Delaware Superior state court violated Superior Court Criminal Rule 26.1 by failing to transcribe a sidebar conference. (D.I.

1) A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Claims based on errors of state law are not cognizable on federal habeas review. Pulley v. Harris, 465 U.S. 37, 41 (1984); Riley v. Harris, 277 F.3d 261, 310 n.8 (3d Cir. 2001). Thus, because this claim alleges a violation of state law, the court concludes it is not cognizable in this federal habeas proceeding. See Ross v. Redman, Civ. A. No. 85-355-JLL, Rept. & Rec. At 3-4, nn. 2-3 (D.Del. May 23, 1986) (adopted June 9, 1986) (where state court's failure to record ten sidebar conferences was held to be a question of state law and not a cognizable ground for federal habeas relief).

B. Entire § 2254 petition is time-barred

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") prescribes a one-year period of limitation for the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). The AEDPA states, in pertinent part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review

28 U.S.C. § 2244(d)(1). If a state prisoner appeals a state court judgment, the state court criminal judgment becomes final,

and the statute of limitations begins to run, "at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires." See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

In the present case, the Delaware Supreme Court affirmed petitioner's conviction on August 4, 1999, but remanded the matter to Superior Court to correct its sentencing order. Pusey v. State, No. 20,1999 (Del. Aug. 4, 1999). The Superior Court corrected its sentencing order on September 15, 1999, but did not enter the judgment until September 24, 1999. State v. Pusey, ID No. 9804014416 (Del. Super. Ct. Sept. 15, 1999); D.I. 8, Del. Super. Ct. Crim. Dkt. #43.

This sequence of state court rulings generates two possible trigger dates for the finality of judgment determination. Respondents assert that the ninety-day certiorari review period began on August 4, 1999, the date the Delaware Supreme Court affirmed petitioner's conviction. As such, the judgment became final for the purposes of § 2244(d)(1) ninety days thereafter, on November 3, 1999. See Kapral, 166 F.3d at 575, 578. Thus, under this analysis, petitioner's habeas petition had to be filed by November 3, 2000 in order to be timely. (D.I. 6)

However, in ruling on petitioner's Rule 61 motion for post-conviction relief, the Delaware Superior Court concluded that

petitioner's judgment became final under state law on September 24, 1999. State v. Pusey, Jr., ID No. 9804014416, Order, at ¶ 6 (Del. Super. Ct. Aug. 30, 2002). If this date is considered the trigger date, then the certiorari review period expired on December 24, 1999. Thus, the one-year federal habeas filing period would end on December 24, 2000.

Given the filing date of petitioner's habeas petition, this court concludes the difference in dates to be immaterial. The court's docket reflects that petitioner filed his habeas petition on September 24, 2002. (D.I. 1) Regardless of whether the one-year filing period ended on November 3, 2000 or December 24, 2000, petitioner filed his habeas petition more than one year too late.

Nonetheless, if either the doctrine of statutory tolling or equitable tolling applies, then the petition will not be time-barred. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The court will discuss each doctrine in turn.

1. Statutory Tolling

Section 2244(d)(2) of the AEDPA specifically permits the statutory tolling of the one-year period of limitations:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending should not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). The Third Circuit views a properly

filed application for State post-conviction review as "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). A post-conviction motion filed after the expiration of the one-year filing period does not toll the limitations period. Price v. Taylor, 2002 WL 31107363, at *2 (D. Del. Sept. 23, 2002).

Here, petitioner filed his motion for post-conviction relief on January 23, 2002. Even assuming the one-year period of limitations expired on December 24, 2000, petitioner did not file his state motion for post-conviction relief within the one-year federal habeas filing period. As such, petitioner's motion for post-conviction relief has no tolling effect in this matter. Id.

2. Equitable Tolling

A petitioner may also avoid the AEDPA one-year time period by demonstrating that the doctrine of equitable tolling applies to the habeas petition. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 122 S.Ct. 323 (2001); Miller v. New Jersey State Dep't of Corrs., 145 F.3d 616 (3d Cir. 1998). Equitable tolling is proper when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." Id. at 618 (internal citations omitted). The Third Circuit permits equitable tolling for habeas petitions in only four narrow circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights;
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum; or
- (4) where [in a Title VII action] the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or the court misled the plaintiff into believing that he had done everything required of him.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Federal courts invoke the doctrine of equitable tolling "only sparingly." See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). In order to trigger equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims"; mere excusable neglect is insufficient. Miller, 145 F.3d at 618-19 (citations omitted). For example, in non-capital cases, inadequate research, attorney error, miscalculation, or other mistakes do not qualify as "extraordinary circumstances" sufficient to trigger equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." Jones, 195 F.3d at 159 (quoting Midgley, 142 F.3d at 179).

In the instant case, petitioner has failed to articulate any extraordinary circumstances that prevented him from filing his petition with this court in a timely manner. Even though he

filed a "Response to State's Answer," (D.I. 9), this response does not address respondent's clear assertion that petitioner's habeas petition is time-barred. Moreover, the court has independently reviewed the record and can discern no extraordinary circumstances that warrant equitable tolling. Accordingly, the court concludes that the doctrine of equitable tolling is not available to petitioner on the facts he has presented, and therefore, petitioner's § 2254 petition will be dismissed as untimely.

IV. CERTIFICATE OF APPEALABILITY

Finally, the court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the

court was correct in its procedural ruling. Id. “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” Id.

The court concludes that reasonable jurists would not find its conclusion to dismiss petitioner’s habeas petition to be unreasonable. Consequently, petitioner has failed to make a substantial showing of the denial of a constitutional right, and the court declines to issue a certificate of appealability.

V. CONCLUSION

For the reasons stated, petitioner’s application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

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GENERAL OF THE STATE)	
OF DELAWARE,)	
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Respondents.)	

ORDER

At Wilmington, this 13th day of November, 2003,
consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Melvin Pusey's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 1) is DISMISSED, and the relief requested therein is DENIED.

2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson
UNITED STATES DISTRICT JUDGE